Cooper Tire & Rubber Company a*nd* International Brotherhood of Electrical Workers, Local Union 1634, AFL–CIO, Petitioner. Case 18–RC–17081

October 28, 2003

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

The National Labor Relations Board, by a three-member panel, has considered the objection to an election held on January 31, 2003, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 6 for and 6 against the Petitioner with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendations, and finds that the election must be set aside and a new election held.

The hearing officer found that the Employer engaged in objectionable conduct by threatening unit employees with a loss of benefits if they selected the Union as their bargaining representative. Specifically, the hearing officer found that the Employer interfered with the election when Distribution Center Manager Todd Lemke circulated a question and answer memorandum to employees on January 27, 2003, containing the following statement regarding employee eligibility for its ROAM bonus:[2]

> *QUESTION #22:* If the I.B.E.W. gets in here, will we still be eligible for the ROAM bonus?
>
> *ANSWER:* I don't know. Cooper has some unionized workers at other facilities and none of them participate in the ROAM bonus program. Cooper expects to announce the amount of the ROAM bonus for this year early next month. Early indications show that the ROAM bonus looks very promising this year.

Either before or after January 27, but clearly before the January 31 election, Lemke informed employees during a general meeting that the ROAM bonus would be 6.2 percent, subject to Board of Director approval. Lemke told employees that "you can count on 6-ish payable . . . mid- to late February."

The hearing officer found that the January 27 question and answer was objectionable because it reasonably would lead employees to believe that receipt of the 2002 bonus was in jeopardy if they selected union representation. The hearing officer rejected the Employer's arguments that employees reasonably would understand that this question and answer referred only to future bonuses (for 2003 and thereafter). The hearing officer found that "to a reasonable employee, the 2002 bonus was still a future bonus, too, because it hadn't been paid yet." Thus, even if, as argued by the Employer, employees knew that the 2002 bonus "accrued" as of December 31, 2002, the hearing officer found that they likewise would have known that it was contingent, until mid-February 2003 (after the election), on a vote of the board of directors.

The hearing officer further found that Lemke's statement to employees at the meeting about the ROAM bonus did not warrant a contrary result. The hearing officer concluded that if that meeting preceded the January 27 literature, the January 27 memo would have called into question Lemke's statement. Even if Lemke's statement postdated the question and answer, the hearing officer found that Lemke's statement did not clearly indicate that the bonus would be paid to the unit employees regardless of the results of the election.

Finally, the hearing officer found that although the Employer explicitly informed 1 unit employee that the 2002 ROAM bonus would be paid to employees regardless of the outcome of the election, this left the remaining 11 unit employees unclear as to what would happen, in circumstances where a single-vote shift could have affected the outcome of the election.

The Employer excepts, arguing that the January 27 question and answer merely conveyed a reasonable uncertainty as to whether the employees, through collective bargaining, would retain their *future* eligibility for the ROAM bonus program. The Employer contends that this meaning was evident to employees because eligibility for the 2002 bonus had already vested as of December 31,

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co*., 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] The ROAM bonus, part of a profit-sharing program, is calculated from the Employer's financial results in the preceding year and is typically granted to employees in mid to late February. The 2002 ROAM bonus was 6.2 percent of the employees' base salaries. In the previous 5 years, the bonus ranged from 1.38 to 3.65 percent

2002.[3] The Employer further asserts that because other statements in the January 27 memo fairly described the bargaining process, employees reasonably would have understood that any reference to employees' eligibility for the ROAM bonus related to future years. Finally, the Employer argues that Lemke's subsequent announcement of "a 6-ish" ROAM bonus made clear that its prior question and answer addressed future bonuses, not the already earned 2002 bonus.[4]

We find no merit to these exceptions. For the reasons set forth by the hearing officer, we agree that the January 27 question and answer statement interfered with the election because it reasonably would lead employees to believe that receipt of the 2002 ROAM bonus was contingent on how they voted in the election.

It is well settled that an employer violates the Act by informing its employees that they will be automatically excluded from a benefit as soon as a union represents them. See, e.g., *Hertz Corp.*, 316 NLRB 672 (1995). Further, although it is permissible for an employer to tell its employees that all benefits will be negotiable and that existing benefits may be lost as a result of the bargaining process,[5] statements are objectionable when they effectively threaten loss of existing benefits and leave the employees with the impression that what they may ultimately receive depends in large measure upon what the union can induce the employer to restore. *Plastonics*, 233 NLRB 155 (1997). Finally, employer statements are objectionable where employees reasonably could infer from them that an existing benefit was contingent upon the employees remaining nonunion. *Georgia-Pacific Corp*., 325 NLRB 867 (1998).

Applying this precedent, we find that the January 27 question and answer reasonably suggested to employees that they would be foreclosed from obtaining their 2002 ROAM bonus if the Union represented them. Thus, the language in this question and answer put in doubt the employees' eligibility for the ROAM bonus, and linked receipt of current and future bonuses to remaining nonunion, while simultaneously intimating that the 2002 ROAM bonus amount (for those eligible) looked very promising. In these circumstances—and particularly since the 2002 bonus was not payable until approved by the board of directors, and such approval would not occur until after the election—we find that the employees reasonably could infer that the receipt of the ROAM bonus was contingent upon the work force remaining nonunion.[6]

By emphasizing that none of Cooper's unionized workers participate in the ROAM bonus program, the Employer might have caused employees reasonably to believe that their receipt of the bonus was conditioned on their choosing to remain nonunion. In so doing, the Employer interfered with the employees' ability freely to choose whether or not they wished to be represented by the Union. Moreover, the Employer's failure to directly disavow or clarify the statement by explicitly informing employees that election of the Union would not result in the automatic loss of ROAM benefits only served to reinforce the threat. See *Yuma Coca-Cola Bottling Co.*, 339 NLRB No. 14, slip op. at 2 (2003). Thus, contrary to the Employer, we find that Lemke's announcement of the 6.2 percent ROAM bonus to employees—unaccompanied by assurances that they would receive it regardless of the election outcome—was insufficient to clarify the January 27 statement.

We disagree with our dissenting colleague that the January 27 question and answer was merely a benign explanation of the ROAM bonus eligibility. Reasonably read, the statement is anything but benign. Employees reasonably could view the statement as requiring them to choose between union representation and ROAM eligibility. We likewise reject the dissent's attempt to nullify the implicit threat in the question and answer by parsing out each statement contained in it and arguing that, since—considered separately—each statement is factually accurate and unobjectionable, the entire statement likewise must be unobjectionable. It is well settled that alleged threats must be considered in context. Here, that context is the Employer's direct linkage of the "very promising" 2002 ROAM bonus to claims of uncertainty that the employees would receive it, particularly pointing out that none of its represented employees were so entitled. Finally, we reject our dissenting colleague's argument—neither raised by the Employer nor supported in case law—that even if the question and answer reasonably could be understood as relating to the 2002 ROAM bonus, it was not objectionable because that bonus lawfully was subject to negotiations. As entitlement to that bonus had vested *prior* to the election, it was not a bene-

[3] Although board of director approval remained, the Employer asserts that such approval was applicable to all eligible employees (not merely those whom the Union sought to represent).

[4] Although the Employer argues that Lemke's meeting with the employees occurred after the January 27 memo was distributed, the evidence conflicted on this point and the hearing officer specifically declined to determine the order of these two events.

[5] See, e.g., *La-Z Boy*, 281 NLRB 338, 340 (1986).

[6] We reject the Employer's argument that the objection must be overruled because the Union did not introduce evidence that unit employees believed that their 2002 ROAM bonus was contingent on the outcome of the election. The test is whether employees reasonably would believe that they could lose an existing benefit as a result of unionization, not the actual effect on the employees. *Smithers Tire*, 308 NLRB 72 (1992).

fit that the Employer could thereafter threaten to eliminate or condition on the Union being able to bargain it back for the employees.

Accordingly, having found that the statement is objectionable, we shall set aside the election and direct that a new one be held.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the notice of second election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have been discharged for cause since the payroll period, striking employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Brotherhood of Electrical Workers, Local Union 1634, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. October 28, 2003

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting.

At issue in this case is whether the Employer interfered with the election by "notify[ing] all eligible voters on the week of the election that the [ROAM] bonus they had earned from the year 2002 may not be paid if the employees voted for Union representation." My colleagues adopt the hearing officer's findings that the Employer engaged in such objectionable conduct. I disagree.

As set forth in the record, the ROAM bonus is a long-established benefit that is calculated on an annual basis, vests at the end of each calendar year, and is paid out early the following year.

During the union organizing campaign, employees questioned the Employer about the effect union representation would have on their wages and benefits, including the ROAM bonus. For example, in mid-January, 2003, an employee asked Distribution Center Manager Lemke if employees would receive the 2002 ROAM bonus if the Union were voted in. Lemke responded that the employees would still receive that bonus as it was earned in 2002. In response to this and other questions, Lemke distributed a list of questions and answers to employees on January 27, 2003. Question and answer 22 on that list stated the following:

> *QUESTION #22*: If the I.B.E.W. gets in here, will we still be eligible for the ROAM bonus?
>
> *ANSWER:* I don't know. Cooper has some unionized workers at other facilities and none of them participate in the ROAM bonus program. Cooper expects to announce the amount of the ROAM bonus early next month. Early indications show that the ROAM bonus looks very promising this year.

In its answer, the Employer was responding to the question of whether employees would remain eligible for the ROAM bonus if the Union won the election. As the 2002 bonus had already vested, this question related to future bonus years. This is further supported by the fact that the election was scheduled for January 31, 2003. Thus, this question referred to bonuses of 2003 and beyond.

In response to this question, Employer Representative Lemke correctly stated in his written answer that he did not know. Indeed, he could not know. The bonus for 2003 and beyond would depend on negotiations. If the Union were selected, that matter would be the subject of negotiations. And, the Employer correctly pointed out that negotiations at other unionized facilities had not resulted in a ROAM bonus.

By contrast, after indicating that he did not know about future years, Lemke directly spoke of the bonus for "this year," meaning 2002. That amount would be announced "early next month" (February) and looked "very promising." As recognized by the hearing officer, this was factually accurate and there is "nothing objectionable in the employer announcing the results of such a program as soon as it knows them."

This message was reinforced at a meeting held before the election. At that meeting, Lemke said that, for 2002, the employees "can count on" a bonus in the range of 6 percent. Although the final amount was subject to board of director approval, scheduled for February 2003, Lemke said nothing to suggest that such approval was contingent on the election results.

In sum, the employees reasonably understood that they definitely would receive a bonus for 2002, and that if the Union were selected future bonuses would not necessarily be given.

Further, even if it were assumed, arguendo, that the 2002 bonus was not a "done deal" until board of director approval, I would find that the Employer's statements were nonetheless privileged. If the Union won the election on January 31, the ROAM bonus would be subject to negotiations. That is, the Employer could place that open matter on the bargaining table, along with all other matters. Thus, the Employer would be correct to say that if the Union were chosen the 2002 bonus would be uncertain.

In sum, I find that the Employer's statements were factually and legally correct. They were therefore not objectionable.[1]

Dated, Washington, D.C. October 28, 2003

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

[1] My colleagues, citing *Yuma Coca-Cola Bottling Co.*, 339 NLRB No. 14 (2003), find that the Employer was obligated to clarify question and answer 22 so that employees reasonably would understand that their eligibility for the 2002 bonus was not dependent on their remaining nonunion. I disagree. I dissented from the majority opinion in *Yuma*. However, even under that majority view, I find that *Yuma* is distinguishable.

In *Yuma*, the employer stated that "with the union there is no 401(k)." Having made that definitive threat, the employer was under a duty to disavow it. By contrast, the Employer here made no such threat. It informed the employees that the 2002 bonus likely would be paid and that the 2003 bonus depended on negotiations if the Union were selected.